In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHIN BAK KAN
v.
THE UNITED STATES. } No. 525.

CHIN YING
v.
THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

1.

AS TO LEE YEN TAI.

This case comes up on certificate of the court below. Two certificates were transmitted. The one of later date evidently dismisses or displaces the earlier one.

Lee Yen Tai (an *alias*), a Chinese laborer, unlawfully entered the United States, without producing the required certificate, and was not entitled to remain. So the commissioner in northern New York found, and ordered him to be deported. While in the custody of the marshal for this purpose the district court in southern New York issued habeas corpus. The petition for the writ averred the merchant status; the return setting up the commissioner's adjudication and warrant of deportation was traversed, but no evidence of merchant status was introduced. The court, after hearing, discharged the Chinaman upon bail for appearance. The United States appealed and argument was had in the appellate court, whereupon the following question was certified to this court:

Question. Is section 12 of "An act to execute certain treaty stipulations relating to the Chinese," approved May 6, 1882, as amended by the amendatory act of July 5, 1884, and continued in force by section 1 of the act of May 5, 1892, repealed by the treaty or convention with China proclaimed December 8, 1894?

This is the chief question in all three cases.

2.

AS TO CHIN BAK KAN.

The charge against this Chinaman as a laborer entering unlawfully, without certificate, and not entitled to remain, was the same. The finding of the commissioner was the same, and a similar order of deportation was issued (Rec., p. 16). Part of the evidence was taken before a commissioner, who became ill and could

not finish the case. He overruled an untenable objection of the Chinaman's counsel (p. 5 , but the proceedings were altogether regular, and by stipulation (p. 16) another commissioner of the same district continued and completed the case, considering all the evidence. The Chinaman duly appealed from the latter commissioner's order to the district court, which affirmed the judgment of deportation (p. 19). Upon application to Mr. Justice Peckham an appeal to this court was allowed, to operate as supersedeas with stay of the warrant, and bail was authorized and taken (pp. 19–22).

The evidence (pp. 3–16) shows complete justification for the commissioner's decision. The fraudulent claim is manifest. An alleged uncle of the Chinaman testifies (on April 27, 1901) that he came to this country *twenty-five* years ago; that he has been here in various places ever since, excepting two visits to China of two years each, and was in San Francisco for the first ten years after his arrival, and was living there in the same house with his sister when Chin Bak Kan, her son, was born in the *first* year after arrival; that he knew the son for the *first* seven years of his own residence in San Francisco; that Chin Bak Kan was then (1901) *22* years old. When the certificate of the witness as a registered laborer was produced (p. 5), with his application therefor (p. 10), it appeared that the certificate was issued on February 12, 1894, and that the witness then swore that he landed in the United States on July —, 1879. This date is, of course, inconsistent with his oath that

he had first come to the United States twenty-five years before 1901; that is, in 1876. So that on the facts shown, if Chin Bak Kan is 25 years old, and the uncle was living with his sister and her husband when the son was born, he must have been born in China, or if he was born in this country, the uncle's sworn application for a registered laborer's certificate does not state truly the date of his own first arrival here. Lee Sing testifies positively (p. 11) that the witness (the "uncle," Gong Wing) arrived at San Francisco, per the *City of Pekin*, in July, 1879. This is enough to destroy the alleged uncle's evidence, without regard to its improbable character as a whole. The witness, Lee Sing, testifies that Gong Wing and his alleged sister did not live in the house in San Francisco where the former swears they did live at the time Chin Bak Kan was born; that other people, all men and well known to him, lived there, and that Gong Wing, whom he knew then and still knows, lived in another street (pp. 11–13), It is no wonder that Chin Bak Kan did not satisfy the commissioner by affirmative evidence of his right to be in the United States.

3.

AS TO CHIN YING.

The proceedings, findings, and result were substantially the same in this case as in the last. (Rec., pp. 12, 1 and 2, 13–16.) The evidence brought out a striking disclosure of the fraudulent character of the claim. Again there was an "uncle," who, in the more recent cases, takes the place of the "father" as a witness.

Ching Ying is his sister's son. The son was born in San Francisco, and the uncle was living in the same house with his sister at the time of the birth. There were the same intermediate comings and goings between China and the United States by the uncle and nephew; the same marks of a typical fabrication running through all these cases. In this case the uncle's laborer certificate appeared in evidence (p. 6), but not his sworn application. I am not, therefore, able to say positively whether or not there is an implication of the same variation between the witness's testimony and the application as to the dates of original entry, the "nephew's" birth, age, etc.

Here, as in the Chin Bak Kan case, there is another feature of the usual tale by rote, namely, that the son was born in the first year after the uncle's arrival with his sister and her husband. It was then brought out—the papers showing the facts being received in evidence without objection (pp. 6, 10)—that Chin Ying, under the name of Sum Jim, claiming to be a merchant, had been refused permission to reenter this country as such, and various representations in his behalf as to his merchant status were made to the Secretary of the Treasury. Sum Jim's photograph was attached to his certificate of identification when he left this country for a temporary visit to China in 1897 (p. 9), and the witnesses supporting his claim of merchant status declared that the firm name is a fanciful designation and does not contain the name of any of the partners. Nevertheless, this certificate

did not avail him, and his application to land on his return from China was denied December 28, 1899 (p. 10).

It is evident from these documents, so far as human conviction and certainty can go, that the Government officers were well assured that Sum Jim and Chin Ying are one and the same person, and that he was justly refused readmission on his merchant claim, because he was, in fact, a laborer and laundryman in Mott street, New York. His "uncle" having testified that Chin Ying had never worked or lived in New York, became alarmed when the Mott street address was brought out, and would merely say that he did not know whether Chin Ying had lived there or had been a member of a mercantile firm, and did not know where he was in any of the years between 1895 and 1898, although he previously testified that Chin Ying had been in China ever since his departure from this country when he was 10 years of age.

Thus in both cases is the claim of citizenship by reason of birth in the United States founded upon discredited testimony, and in Chin Ying's case the supposed "native born" is shown not only to have been a laborer, but one whose admission to this country on a fraudulent merchant claim was denied.

Some Chinese were doubtless born in this country twenty to thirty years ago, but there were comparatively few Chinese women here then and very few who were wives and mothers. The growing and disproportionate number of Chinese adjudged to be native-born citizens is matter of grave concern when we con-

sider the probabilities at the period of the supposed births here, and the flippant and meretricious motives upon which the claim to citizenship is often advanced.

It is to be noticed that counsel for Chin Ying admit (p. 3) that he is a Chinese person and not a member of the exempt class, and came into the United States as charged in the complaint and warrant. This is consistent with the native-born claim, but of course not consistent with the fact that the man had claimed in 1897 and again in 1899 that he was a member of the exempt class.

ARGUMENT.

There appears to be no difficult question of jurisdiction as to this court, but the situation in that regard may be submitted. The appeals here were taken under section 13 of the act of September 13, 1888, the question of the validity of which, as dependent upon a treaty never ratified, has been or is now before the court in regard to various provisions. The United States has never strenuously resisted on the ground indicated the right of appeal by Chinamen under section 13. The language of the act is that "any such Chinese person * * * may * * * appeal to the judge of the district court for the district." No right of appeal is given to the United States and no further appeal to Chinamen. Obviously, the proceedings being civil rather than criminal in their nature, it is pertinent and fitting that the United States should have the right of appeal, especially when the grave matter of citizenship is involved.

It is assumed that the appeals herein were allowed under section 5 of the circuit court of appeals act, because the validity or construction of a treaty is drawn in question. It is not material to the present issue, but the remark may be volunteered that upon the same theory, or under some other paragraph of section 5, the United States would be entitled to take an appeal from the district court with equal right, or should be allowed an appeal with as strong an influence upon the judge's discretion. For although the United States may not be able to carry the case from the commissioner to the district court, if, on a Chinaman's appeal, the district court discharges the Chinaman, then the United States ought to be able to bring the case to this court by appeal, because of the civil nature of the questions involved and their national and international importance, and because of the scope and meaning of the fourth and fifth clauses of section 5 of the circuit court of appeals act. This suggestion seems to complete the jurisdictional situation. It must probably be admitted that such views might be urged with force upon the discretion of a court to allow an appeal, but might not fully sustain and vindicate an appeal by the United States as of right.

I.

THE ASSIGNMENTS OF ERROR.

Having lodged these cases here on the only claim which could justify the jurisdiction, namely, the construction of the treaty, counsel seek to broaden the field of review and attack the commissioner's proceedings and findings on the naked proposition that a mere

claim of citizenship ousts the commissioner's jurisdiction to find a Chinese person not entitled to remain in the United States and to deport him. There were some other formal objections, but they merit no attention. Formal defects in the proceedings do not invalidate the statute or the jurisdiction or proceedings thereunder. (*Fong Yue Ting* v. *United States*, 149 U. S., 698, 729; *Chow Loy* v. *United States*, 112 Fed. Rep., 354.) The chief error assigned is that section 3 of the act of May 5, 1892, was repealed by the treaty of 1894, and that the treaty repealed generally the provisions of law theretofore in force conferring jurisdiction over proceedings for the deportation of persons of Chinese extraction, and against Chinese persons found in the United States and charged with unlawful entry into the United States (p. 23, Rec. in No. 525; p. 19, Rec. in No. 526).

II.

THE COMMISSIONER'S JURISDICTION APART FROM THE OBJECTIONS BASED UPON THE TREATY.

a. In general.

It should not be necessary to dwell upon the proposition that the commissioner is authorized and empowered to determine the facts. It is the commissioner before whom a Chinaman must establish his right. The language of the law is (sec. 3, act of 1892) that the Chinese person shall be adjudged to be unlawfully within the United States unless he "shall establish by affirmative proof to the satisfaction of such justice, judge, or commissioner his lawful right to remain

in the United States." It may be that on the appeal to the district court a right to review the facts attaches; but certainly the well-established principle that the facts may not be reexamined in an appellate tribunal controls the appeal allowed to this court. This appeal is based upon the single and definite question of law respecting the treaty under section 5 of the circuit court of appeals act, and is restricted to the inquiry whether *ab initio*, as a question of law, the commissioner had any authority or jurisdiction at all.

The situation is analogous to *habeas corpus* proceedings, in which on original application the only question is whether the proceedings complained of were wholly void, or whether there was no legal authority for the action resulting in the petitioner's detention (*In re McKenzie*, 180 U. S., 536), and in which, on appeal, the revision in the appellate court goes to the authority of the lower tribunal and the legality of its action, but does not pass upon the facts or review the proceedings below when duly authorized. (*Benson* v. *McMahon*, 127 U. S., 457; *In re Luis Oteiza y Cortes*, 136 U. S., 330; *Nishimura Ekiu* v. *United States*, 142 U. S., 651; *In re Lennon*, 150 U. S., 393; 166 U. S., 548, and auth. cit.)

This doctrine, in the recent cases of *Carter* v. *Roberts*, 177 U. S., 496, 498; *Carter* v. *McClaughry*, 183 U. S. 365, 381, was applied with the greatest force, perhaps, because there the question was of a review and revision by a civil tribunal of proceedings of a court-martial. But the principle is a general one and, subject to well-defined restrictions, is generally appli-

cable, especially to a case in which the lower tribunal must expressly be satisfied that the right claimed is well founded.

The last case before the court in which a commissioner's jurisdiction was involved was that of *Li Sing* v. *United States* (180 U. S., 486). There the court evidently considered that the decision of the commissioner (no appeal having been taken, but *habeas corpus* being sued out) is final on the facts. In effect, the petitioner sought to have the facts reviewed, and the briefs presented and argued this very question before the court. This court left that subject with the statement that the commissioner "had authority under the statutes to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States," and then proceeded to consider only the errors of law alleged to exist in the commissioner's acts.

b. On claim of citizenship.

It may be that on a claim of citizenship there is an instinctive pause, and the influence of a feeling or sentiment that that claim should be relieved from the usual rules and proceedings in Chinese cases. But citizenship is sacred from the point of view of guarding its sanctity against designing and fraudulent use, as well as when invoked as a support and shield to just rights. The claim is easily made and is notoriously now made as one of the most hopeful among the shifting devices of Chinese persons not permitted by the laws to enter the country. I know of no reason why a commissioner

should not pass upon this claim as well as upon any other claim adduced by a Chinaman in his effort to satisfy the commissioner of his right to remain here. It must always be remembered that the Chinaman must establish his right to the commissioner's satisfaction. To assert citizenship does not establish the right, and the commissioner is not required on that assertion, with the doubtful evidence accompanying it, to abdicate his reason, intelligence, and judicial judgment. I reiterate that when that claim or any other claim is made the Chinaman must establish it; the Government is not called upon to disprove it, and I can perceive no reason for the contention (made in effect) that the commissioner before such a claim must not only apply unusual scrutiny and deliberation, but must presume that the Chinaman and his witnesses are telling the truth on this particular matter.

The district court for Vermont has recently decided in four cases that, where the sworn application for a registered laborer's certificate shows that the Chinaman first landed in this country at a time later than that fixed as the date of the birth of the alleged native born, it so far impeaches the testimony of the pretended father or other witness to birth that such testimony can not be accepted as sufficient proof of nativity. Two of these cases are now pending on appeal to this court, namely, the cases of Leung Quong and Leung Ming. Judge Wheeler's opinion in those cases is as follows:

> The explicit statement of the principal witness, the uncle of appellants, of the year, month,

> day of month, and vessel of his arrival in the United States, in his application for a laborer's certificate shows, in connection with his testimony, that he came but once; that at the time of their birth he was in China, and that his knowledge of their birth, as he states it, would be of their birth in China. The testimony of the other witness, that they were born in California, although more consistent, is not sufficient to overcome this and make their citizenship clear. Deportation affirmed. (111 Fed. Rep., 1007).

The case of *Quock Ting* v. *United States* (140 U. S., 417), involving this very point, holds that "uncontradicted evidence of interested witnesses to an improbable fact does not require judgment to be rendered accordingly." The court say:

> The question presented is whether the evidence before the court below was sufficient to show that the petitioner was a citizen of the United States. The testimony given by himself amounted to very little. Indeed, it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evidently the result of instruction for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. * * * The testimony of the father was also devoid of any incident or circumstance corroborative of his statement. The production of the so-called store book * * * does not strike us as at all conclusive. * * * The alleged entry

> could as easily have been made as the manufacture of the story repeated. * * *
>
> Undoubtedly, as a general rule, positive testimony as to a particular fact uncontradicted by anyone should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.

"Although the claim of one of Chinese parentage who is seeking admittance to this country that he was born here is corroborated by another Chinese witness and uncontradicted, yet their testimony may be discredited if contradictory as to other matters." (*In re Jew Wong Loy*, 91 Fed. Rep., 240; see also *Gee Fook Sing* v. *United States*, 49 Fed. Rep., 146; *United States* v. *Lee Pon*, 94 Fed. Rep., 827.)

In *In re Louie You* (97 Fed. Rep., 580) the court said:

> I am not willing to establish the precedent of admitting Chinese persons who have admittedly

> remained out of the country for so great a length of time [in this case sixteen years], unless some white witness, or some fact not depending upon Chinese testimony, corroborates the testimony of the Chinese witnesses relied upon to establish the identity of the person who seeks a landing. Those who leave the country when infants must not expect to gain ready readmission after they have, in effect, reached maturity. If satisfactory proof of their right to land is not possible in such a case, the fault is theirs. The difficulty is one easily foreseen.

These records, however, seem to me impregnable on all branches of the case. If the Government should concede (which ~~we do~~ it does not concede), or the court should hold, that the entire case may be reviewed here fundamentally and *de novo*, I think the Government contentions on the facts will stand the closest scrutiny. Can it be said with any fair degree of probability—much less certainty—that these Chinamen *have* established their claims to citizenship? Upon the facts drawn from the record, as set forth above, I do not think it is necessary to dwell any longer on this phase of the case.

c. A commissioner is a judge under these laws.

This is a proper place to refer to an objection of the appellants which seems to be without merit. Section 6 of the act of 1892, relating especially to the registration of resident laborers, unlike section 3, provides that a Chinese laborer who neglects, fails, or refuses to register within a certain time shall be taken before

a *United States judge*, and shall be ordered to be deported unless he shall establish to the satisfaction of *said judge* that he has been unable to procure his certificate, and to the satisfaction of *the court* that he was a resident of the United States at the time of the passage of this act. This section is not, indeed, essentially involved in these cases, because these men do not claim to be registered laborers. Their claim is wholly inconsistent with that status.

But it may be said in connection with the act in which the words occur, and in their relation to all of the Chinese exclusion legislation, that the words "United States judge," "said judge," and "the court," in section 6, obviously refer to the tribunal for Chinese cases composed of either a justice, a judge, or a commissioner. It does not strain the meaning of language to contend that these words in section 6 apply to both the superior judicial officers and the inferior judicial officer named in section 3. That is quite clearly the intention of the law. The collocation of the three words "justice, judge, and commissioner" is frequent throughout the acts (e. g., section 12, act of 1882; and see same section amended in the act of 1884; section 13, act of 1888, and section 3, act of 1892). Where it is plain that the judge of the district court is intended, the law uses that phrase, as in the provision for an appeal in section 13 of the act of 1888. But in section 6 of the act of 1892 and its amendment of 1893 the phrase "United States judge" is used simply to avoid the repetition of that collocation several times within the limits of one section of the law.

A United States commissioner is a quasi-judicial officer (*In re Kaine*, 14 How., 103; *United States* v. *Jones*, 134 U. S., 483; *United States* v. *Allred*, 155 U. S., 591); in colloquial use of the term he is a United States judge, and certainly under this law and in the conduct of hearings in Chinese cases his function is that of a judge or a court *pro hac vice*.

In the case of *In re Wong Fock* (81 Fed. Rep., 558) Judge Morrow held that a United States commissioner is a "United States judge" within the meaning of section 6 of the act of 1892, saying:

> Section 3 of the act is to be read in connection with section 6. Section 2 of the same act is also consistent with and fortifies the interpretation to be given to the expression "a United States judge." That Congress intended that United States commissioners should have the power to determine whether Chinese persons were lawfully within the United States, and to make the appropriate order of deportation if they were found to be within the United States in violation of section 6 of the act is, I think, patent from a reading of the act * * * in its entirety, and also from previous acts upon the subject (citing section 13, act of September 13, 1888; section 12, act of May 6, 1882, as amended by the act of 1884). The expression "A United States judge," found in section 6 of the act of May 5, 1892, is, in my opinion, a general one, and refers to those judicial officers (viz, "justice,

> judge, or commissioner") previously and specifically enumerated in sections 2 and 13 of the same act. A United States commissioner is certainly a judicial officer, and exercises, it is true, within very narrow limits, the functions of a United States judge.

Referring to the definition of United States judge in the case of Fong Yue Ting, the court said:

> While in the case above referred to the Supreme Court were considering the term "a United States judge" as applied to a district judge, still it would seem that the definition they then gave to the expression * * * in the sense in which it is used in the acts referred to is broad enough to include United States commissioners. I come to the conclusion that United States commissioners not only have the power to adjudge whether a Chinese person is unlawfully in the United States under sections 2 and 3 of the act, but that they have also the power to order a deportation under section 6.

But it is unnecessary to pursue this question, for (1) section 6 is not essentially involved in our inquiry, since the appellants concede that whatever other provisions the treaty repealed, this section is in force because of Article II of the treaty; (2) the United States judge in these cases did hear, adjudge, and order, because these cases went to him on appeal; and (3) these men are not proceeded against strictly as *non-registered* laborers.

d. The court has recently sustained the commissioner's jurisdiction.

Recurring to the Li Sing case, it is apparent, I think, that such petitioners or appellants are almost invariably reduced to abandon their efforts to insist upon a review of the facts here, and are compelled, as these appellants are compelled, to attack the validity of the laws. The court say (180 U. S., p. 492): "We do not understand it to be asserted on behalf of the petitioner that the commissioner disregarded, in any particular, the provisions of the several statutes; but it is claimed that some of those provisions are invalid, and that, therefore, the sentence of deportation should be set aside." Remembering, then, that this case arose and was decided long after the treaty of 1894 was ratified, it will be an appropriate introduction to the next portion of this brief, involving the vital question, to show just what the court held in the Li Sing case, namely, that section 3 of the act of 1892 is constitutional and valid; and that the portion of section 2 of the act of 1893, which prescribes a particular rule of evidence to establish the merchant claim, is consitutional and valid. Both of these propositions had already been settled in the case of Fong Yue Ting, as Mr. Justice Shiras, speaking for the court, points out.

It is interesting to observe as a significant feature in the present case that now again an attempt is made to overthrow section 3 of the act of 1892 on novel and, as we submit, manifestly untenable grounds.

III.

THE QUESTION AS TO REPEAL BY THE TREATY.

The treaty of 1894 (28 Stats., p. 1210), which we quote in full in an appendix, along with certain sections of the act of 1884 and of the act of 1892, has been part of the supreme law of the land for over seven years. The argument that it has in general abrogated the Chinese exclusion policy of this country and has repealed a great portion of the laws on the subject—and, in particular, all of the laws relating to deportation except those which concern registered laborers under article 2 of the treaty and section 6 of the act of 1892, with its amendment of 1893—is now brought forward as a sober proposition, meriting attention, for the first time.

a. Decisions and rulings.

I have pointed out in a related brief now before the court that the effect of the decisions in the cases of Mrs. Gue Lim (176 U. S., 459), and of Li Sing (*supra*), is necessarily fatal to the appellant's contentions. Furthermore, many cases have been decided in lower Federal courts since the ratification and promulgation of the treaty of 1894 which intimate no doubt of the entire consistency between the treaty and the statutes. (*United States* v. *Loo Way*, 68 Fed. Rep., 475; *Wong Fong* v. *United States*, 77 Fed. Rep., 168; *In re Chu Poy*, 81 Fed. Rep., 826; *United States* v. *Yong Yew*, 83 Fed. Rep., 832; *In re Li Sing*, 86 Fed. Rep., 896; *In re Jew Wong Loy*, 91 Fed. Rep., 240; *United States* v. *Chu Chee*, 93 Fed. Rep., 797.)

Some of these cases explicitly refer to and consider the treaty as consonant with and a part of this body of laws.

It is impossible to suppose that the argument now made, if possessing any merit, would not have been heretofore presented to the courts, or, indeed, have been applied to the situation by the courts on their own initiative. Again, the executive authorities have made many rulings on the subject of Chinese exclusion during the last eight years in contemplation both of the treaty of 1894 and the other laws. It has been pointed out through various rulings that in certain minor respects the treaty modified some rule or requirement founded upon the prior acts. In every such case the reason for the view that some minor change had been carried into the scheme was necessarily apparent, and no fundamental repugnancy has ever been suggested. (21 Op. Atty. Gen., 347; 22 Op., 201; T. D. 18343, 18626, 20079.)

I submit that by this uniform acceptance both by the courts and the Executive of the interdependence between the treaty and the other laws, there is established a rule of harmonious judicial construction (in effect), and of long-continued administrative construction in reality and in plain terms, which is final and controlling.

But the analysis of the treaty itself shows better than any other argument that it recognizes, carries out, and effectuates the previous laws and the scheme of exclusion; and instead of repealing, or overthrowing,

or weakening them, the treaty not only does not cut out any essential part of the prohibitions and mandates of the law, or destroy any of the jurisdiction and machinery for procedure, but simply perfects and completes the structure existing when it became law.

b. The history of the diplomacy.

It is not necessary to carry the court's attention back to the diplomatic negotiations and correspondence resulting in the treaty of 1880. These documents are to be found in Foreign Relations of the United States for 1881 (pp. 177–200); see also *United States* v. *Ah Fawn*, 57 Fed. Rep., 591. The most important and significant conclusion to be drawn from these negotiations is that the Chinese Government substantially agreed that the term "laborers" should include constructively every Chinese person applying for admission to this country who was not a member of the particularly defined and specified classes permitted to come, viz, officials, teachers, students, merchants, or travelers for pleasure or curiosity. (Article II, treaty of 1880, 22 Stats., 826; article III, treaty of 1894. See particularly pp. 188, 189, 197, Foreign Relations, U. S., 1881; *United States* v. *Ah Fawn*, *supra*, at p. 595.)

See also intimation on this point in *United States* v. *Mrs. Gue Lim*, 176 U. S., at p. 463.

The correspondence preceding the treaty of 1894 is contained in Senate Executive Document No. 54, Fifty-second Congress, second session. The burden of the Chinese complaints was that the act of October 1, 1888, under the decision of this court in the case of

Chae Chan Ping v. *United States*, 130 U. S., 581, entirely repudiated the stipulation of the treaty of 1880 (article II), that Chinese laborers should be allowed to come and go of their own free will and accord; that tens of thousands of Chinese subjects temporarily left the United States armed with the signed and sealed assurance of this Government of their right to return. It was doubtless with a view to the protest of China on this subject, as shown by the correspondence, that, while the registration and other features of the act of 1892 were adopted against the wishes of China, the provisions of article 2 of the treaty of 1894 were also adopted. After the passage of the act of 1892 the *Yamen* requested our minister—

> to memorialize the President of the United States to instruct Congress to reconsider the recent exclusion act, so that it may be in due observance of international law, and thus show a feeling of regard for the relations of the two countries (pages 28–29, Document 54, *supra*).

The correspondence shows that Congress deliberately determined by the acts of 1892 and 1893 to strengthen the restriction policies, which determination this court has said is sovereign and final; that in view of the valid reasons existing for an exception from the strictness of exclusion as to registered laborers returning from China after temporary absence—on claims recognized in the treaty of 1888 which failed, and in the act of September 13, 1888, dependent thereon—the treaty of 1894 therefore allowed and established this exception beyond question. I have discovered some

statements of the reasons why the treaty of 1888 failed of ratification. The act of 1888 which recognized that treaty was almost immediately followed by the act of October 1, 1888, which made exclusion more rigid, and was the cause of the renewed complaints from China, which suggest that we were not regarding our treaty obligations. In a note from the *Yamen* to Mr. Denby (p. 11, Document 54) appears the following statement:

> Under these circumstances, the ratification by His Excellency, the former President, on the 26th day of the eighth moon last year (western style, the 1st of October), of the statute enacted by Congress prohibiting immigration of Chinese laborers is beyond belief. Further, this *Yamen* had previously, viz, on the 15th day of the eighth moon of that year (September 19), sent a dispatch to your excellency submitting for your consideration three additional clauses to the new treaty. To this, however, your excellency has never replied. The Chinese minister to the United States also submitted these three clauses in a dispatch to the Department of State. He, too, received not a word in reply. The new treaty, however, was rejected, and a new statute was enacted in place of it.

Mr. Denby, in a note to the *Yamen* (p. 30, same document), says:

> It does not come within the purview of the diplomatic officer to discuss the intrinsic merits or demerits of the laws of his country. I beg to remark, however, that if the treaty of

1888 had been approved by the Government of China the questions now mooted would not have arisen. China at that time seemed to fear that if that treaty were approved similar treaties would have to be conceded to other powers. She preferred that her people should be prevented from going to the United States by an act of Congress which she might designate as anti-treaty legislation to their being excluded from other parts of the world by her own consent. The danger of this policy was pointed out by me at the time, and events have justified my remonstrance.

Another reference to this subject is found in a note of Mr. Wharton, the Acting Secretary of State, as follows, referring to the statute of October 1, 1888:

> That statute was brought about by the regrettable failure to complete the treaty signed at Washington March 12, 1888. It does not seem necessary at this late date to discuss the circumstances under which the treaty of 1888 failed, or to conjecture whether, had it been duly perfected, it would have served to avert the difficulties or meet the issues which have since arisen. That the failure of that treaty, through the withholdment of the imperial ratification, exerted a prejudicial influence upon American sentiment thereafter is hardly open to doubt. * * *
>
> As you say in your note of the 7th November: "It is conceded that the Imperial Government has not encouraged the emigration of its people from China to the United States, but, on the

contrary, in the negotiations between the countries on the subject, it has, in the most friendly manner, yielded to the suspension of emigration." It is, perhaps, unfortunate that the tangible expression of this friendly disposition went no further than the negotiations which preceded the collapse of the treaty signed in 1888. I see no reason why a better understanding may not be brought about whereby the position of China shall be rather one of amicable concurrence toward a rational and practical end than one of obstruction to the working of measures the adoption of which has been in a large degree forced upon the legislative power of the United States by the conduct of the Chinese people in this country and by the attitude of the Imperial Government in their regard. (Id., pp. 41, 43.)

This correspondence shows that the Chinese authorities, and not the Government of the United States, were responsible for the failure of the treaty of 1888. A copy of that treaty, as signed by the President, is given in the appendix. It will be observed that it is almost identical with the treaty of 1894.

Thus, it is clear, I think, that the treaty of 1894 was the fruit of negotiations in which the Chinese Government was seeking to obtain a more liberal construction of the privileges which might be accorded Chinese in this country consistently with the exclusion policy; and, after objection to the abortive treaty because they could not obtain more, or because it interfered with their relations with other countries, they concluded

that the modifications of the law finally accorded were desirable.

There is more to be said on this subject. The Chinese minister wrote to Mr. Gresham as follows, November 8, 1893 (Foreign Relations, 1893, p. 263):

> I have the honor to state that I have received information of the passage by the Congress of the United States of an act to amend an act [act of May 5, 1892] entitled "An act to prohibit the coming of Chinese persons into the United States," and I express my thanks for the provision in the bill which stops the proceedings in the prosecution of Chinese persons under the Geary law in the courts and as a result releases them from imprisonment. * * * In view of all the facts, I would respectfully inquire whether it is now the intention of the United States Government to permit these most serious questions to rest as a finality upon the legislation of Congress as it now exists, or whether the thought is entertained of further negotiation through a different source to the end that all the existing difficulties between such nations may be permanently settled, and their honor, dignity, and friendship maintained and preserved? If the Government of the United States desires to entertain and consider any negotiation whatever that may lead to an adjustment of the questions involved, I will willingly join in an interview upon that subject.

This letter fully recognizes (as, indeed, was unavoidable) the power of Congress to enact the Geary law and the amendment thereto, "notwithstanding their

harsh provisions" and the impossibility of the repeal of the Geary law and of any great modification of the existing exclusion enactments, as the minister and the home Government of China had repeatedly been advised by the State Department and our diplomatic authorities. This note seems to have been the first definite proposal concerning the treaty of 1894.

After the treaty was signed by the Secretary of State and the minister of China, the minister wrote a letter to Mr. Gresham, asking that a certain ruling against the return of Chinese merchants should be modified, but plainly showing that China had no idea and made no contention that the acts of 1892 and 1893 were not in force. (Foreign Relations, 1894, p. 166.)

Mr. Gresham, in transmitting a copy of the convention to our chargé d'affaires in China (id., p. 176), says that upon ratification the chargé is "to bring the treaty to the knowledge of citizens of the United States in China, * * * inviting attention to the reciprocal provisions of Article VI concerning registration, and advising all American citizens in China, being laborers, * * * of their obligation to conform to such laws or regulations as the Government of China may enact, similar to the registration act of May 5, 1892, for the registration of such American laborers in China."

The particular correspondence for 1893 and 1894, which brings the negotiations up to the execution and ratification of the treaty, is not published. The failure to publish appears to have been merely inadvertent.

The following is an abstract taken from the files of the State Department:

Mr. Denby, on May 27, 1893, advised the Secretary of State of a communication from the Chinese foreign office to him (inclosing a copy), and, referring to the act of 1892, shows the lack of comprehension of the state of the case by the Chinese authorities in the following sentence: "The substance of this communication is that the *Yamen* desires you to direct the Supreme Court to declare the act unconstitutional."

In a report of an interview between Li Hung Chang and Consul Bowman, contained in a dispatch from Mr. Denby, dated July 7, 1893, Li Hung Chang requested the consul to "inform President Cleveland * * * that if the next Congress decides to enforce the existing law, China will at once retaliate, friendly relations between the countries will be broken off, and laws will be enacted looking to the expulsion of Americans from China." Congress did, however, enforce the existing law by the amendment of November 3, 1893, and China did not retaliate, but proceeded, with a recognition of the laws, to negotiate the treaty.

In a letter to the Secretary of State, dated December 26, 1893, the Chinese minister says:

> According to the reply quoted above, it would appear that the Chinese Government acquiesce to the two propositions of the honorable Secretary, namely, the prohibition of emigration by China and the compliance with the registration laws by her people in this country. The

> Imperial Government, however, desires that steps be taken first to conclude an international agreement. I find that the unratified draft of the convention agreed upon between my predecessor, the late Minister Chang, and one of your honorable predecessors, to be in the main a satisfactory one; but as the aspects of the question under consideration have undergone some change with the lapse of time, it is proposed to adopt it as a basis for negotiation, with a few alterations, as enumerated hereinafter. * * * As the Imperial Government desires to make the convention before the enforcement of the registration laws, it is proposed that if the six months' extension of time, within which registration is to be effected, should expire before the draft of the proposed convention is decided upon, the time be further extended so that no action may be taken to prosecute, imprison, or ill-treat the Chinese.

On January 11, 1894, the minister addressed a note to the Secretary of State inclosing a draft of the proposed treaty between the United States and China, which is given in the appendix to this brief. It will be seen by examining this draft that the very question of the "annulment * * * of all the legislative measures enacted in and since the year 1888 affecting the coming of Chinese subjects to the territory of the United States and their residence therein" was brought forward by China and ultimately rejected by the

United States. In Mr. Gresham's reply, dated January 5, 1894, to the note of December 26, he says:

> * * * In 1886 our minister at Pekin received from the Chinese foreign office a communication announcing that the Emperor of his own accord proposed to prohibit Chinese laborers, under severe penalties, from coming to the United States and from returning to this country after having gone back to China, in order that that class of laborers here might be reduced in number; that the proposed treaty of 1888, which was in harmony with these views, was concluded by the plenipotentiaries of the United States and China to the expressed satisfaction of the latter, and ratified by the Senate with a slight amendment, which the Chinese minister in a note to the Secretary of State remarked did not alter the terms of the treaty; that the subsequent legislation of the United States was in part the result of the failure of the Government of China to exchange ratifications of this treaty. * * *
>
> I now beg to repeat that, pending the negotiation of a treaty, Chinese laborers who desire to remain in this country should not omit compliance with the requirements of this law in expectation of its repeal or further extension by Congress.
>
> Earnestly desiring to strengthen the friendship which has so long existed between the United States and China, and to promote the highest good of the people of both countries, I am

> ready to continue negotiations with you for a convention on the basis of the draft treaty of 1888.

In reply to the note of January 11, Mr. Gresham said (January 29, 1894):

> There are certain recitals and provisions on the draft submitted which this Government desires should be eliminated and other provisions inserted, but I am persuaded from the sentiments expressed by you at our two recent interviews that a convention can in due time be agreed upon, which will be satisfactory to both Governments.

In an amended draft of the treaty submitted by the minister in a note of February 19, 1894, he adds a paragraph, to which in an interview Mr. Gresham had expressed some objection, at the end of Article II, by which Article I was declared not to apply to Chinese laborers who had returned to China from the United States previous to the act of October 1, 1888, possessing certificates of identity under the act of 1884. But the Secretary continued to object to such a provision (note of February 20, 1894), thought that there were very few, if any, Chinamen then in China of the class described, and feared the adoption of the proposed amendment would be objected to by the Senate as opening a door to fraud.

The fact that in the draft proposed by China for the convention of 1894 their utmost demand was that the legislation enacted in and since the year 1888 should be annulled shows very clearly that they accepted the

previous legislation of 1882 and 1884, and their demand respecting later legislation was not granted, as we see from the negotiations and the text of the treaty as adopted.

It is evident that the main object which China was seeking in the negotiations was the repeal or suspension of the registration law (in which she did not succeed), and the abrogation of the act of October 1, 1888, as to Chinese laborers who had departed from this country theretofore possessing certificates of identity under the law of 1884. In this also she did not succeed, for the United States maintained the position that the laborers' right to return should be restricted to registered laborers possessing the qualifications shown in Article II of the treaty.

There can not be any reasonable doubt from the foregoing *résumé* of the treaty of 1894 that the Chinese Government thereby assented to the general plan of exclusion, however protesting their attitude had been toward the strictness of some details, the rigor of enforcement, and the asserted failure of this Government to regard conscientiously the stipulations of the prior treaty. In the end, the recognition of the scheme was relatively cordial, the acceptance of existing laws explicit, and, in fine, while China sought then, as she has always sought, complete freedom of access for her people to the United States, she was satisfied with what she obtained. The imperial ratification of the treaty, as well as the previous negotiations, establishes

this fact. It is difficult to perceive why she should not have been satisfied, since she has never been willing in the past, and doubtless is not willing to-day, to give us any fair correlative degree of the same rights and privileges in China.

Whatever the professions and stipulations of the treaties, there is no real mutuality, and in practice the restrictions against our citizens in China are far greater than our own restrictions against subjects of China. Note, for example, the "serious and useless obstruction to the free travel for which the treaties with China provide," on the familiar grounds of the inability of local authorities to afford timely protection, the bad populace prejudiced against foreigners, requiring the repeated production of passports in person to local authorities, etc. See letters of the *Yamen* to Mr. Denby of December 15, 1893, and Mr. Denby's reply of December 30 (Foreign Relations, 1894, pp. 154–157); see, also, the entire section "China," in Foreign Relations for 1895, Part I, regarding the organized, extensive, and long-continued anti-foreign riots occurring in the province of Szechuan. Page 91 contains a reference to the British consul's statement that there was "complicity" on the part of the officials; and pages 171–173 show that this consul also reported that "the deplorable weakness and duplicity of the local authorities were the indirect cause of the massacre," and the complicity of the troops frequently appears in the various accounts of many acts of violence and slaughter which were perpetrated.

c. An analysis of the language of the treaty.

This, then, being an outline of the diplomacy, let us examine the treaty itself. After the preamble of the proclamation, there is a recital of the treaty of 1880, of the desire on the part of the Chinese Government, in view of the antagonism and disorder caused by the presence of Chinese laborers in certain parts of the United States, to prohibit such emigration from China. There is a recital of the desire of the two Governments to cooperate in prohibiting such immigration, to strengthen the mutual bonds of friendship, and to adopt reciprocal measures for the protection of their citizens and subjects. Article I agrees that for ten years the *coming of laborers* to the United States shall be *absolutely prohibited* except as allowed by Article II. Article II gives a limited right of return to registered laborers having the specified family or property qualifications. Article III leaves the right of the permitted classes as it was before, except that the certificate provided for by section 6 of the act of 1884 may be from the Government of China or the Government where the applicant last resided.

This has been construed to mean that Chinese subjects of the permitted classes coming into the United States from China must produce the certificate of the Government of China, and coming from other foreign countries, in which they are residents, must produce the certificate of the government of such countries. (21 Op., 347; 22 Op., 201.) Chinese laborers shall continue to enjoy the privilege of transit, subject to

regulations to prevent the privilege from being abused. Article IV assures to Chinese in the United States the protection of persons and property accorded the most-favored nation. Article V provides that—

> The Government of the United States having by an act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first-named act to be registered as in said acts provided, with a view of affording them better protection, *the Chinese Government will not object to the enforcement of such acts*, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled (not merchants as defined by said acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

And the United States agrees to furnish to China a list of its citizens residing in China.

Article VI continues the convention for a period of ten years, and provides for renewal for a like period if formal notice of termination is not duly given before the first ten years expire.

It seems supererogation to argue that this treaty explicitly recognized the scheme of exclusion and the acts of 1892 and 1893, and by consequence, and in view of section 1 of the act of 1892, all the existing Chinese exclusion laws. This recognition and these express

provisions are patent on the face of the treaty. No intention whatever is remotely suggested that either party to this contract had in mind any other material modification or disturbance of existing law than the allowance of a limited right of return to registered laborers. The unratified treaty of 1888 is substantially the same as the treaty of 1894. The return privilege of registered laborers was the striking feature of both treaties, and the act of September 13, 1888, was passed "to prohibit the coming of Chinese laborers to the United States," and yet was a law which especially contemplated the then pending treaty and was in certain respects, at least, dependent upon it.

It is certainly an astonishing claim that a treaty of practically the same form and purport has the effect of demolishing all the laws, when this treaty (of 1888), after signature and on the eve of a ratification which finally failed because of the Imperial refusal to ratify, called forth a law which recognized and carried it into effect, which renewed and strengthened the exclusion policy, and at the same time regarded and protected the rights of Chinese persons. This act, in part at least, may still be valid law, notwithstanding the failure of that treaty; the later acts of 1892 and 1893, recognizing and continuing all previous laws, add certain new provisions including the registration of laborers. It is on this registration, so built in with the entire framework of the statutes, that the concession of Article II of the treaty of 1894 is founded.

The truth of the matter is that Congress has developed in successive acts a plain and consistent body of legislation, making certain modifications from time to time, now by way of concession and liberality, now by way of increased stringency—so as to make exclusion or expulsion more rigorous and to prevent frauds and abuses, while regarding the rights of Chinamen permitted to enter this country and remain. Academic argument is always possible as to this or that feature of the programme, but such argument invariably runs back to the unjust and inequitable character of this policy, and the last reply to that suggestion is to be found in the closing paragraph of the opinion in the Li Sing case, *supra*. No one can doubt what in the main the law is and means, or that substantially in its general denouncements and sanctions it is the same under and since the treaty of 1894 as it was before.

This court has decided and affirmed and reaffirmed the propositions for which the Government is contending in this case, based upon the very same sections of the statutes now involved. I think the situation justifies the remark that however sincere and earnest counsel may be, this notion about the treaty is a mere phantom and is in effect a pretext to bring the same old series of propositions again before the court.

The true view of the treaty of 1894 is that by its negotiation and ratification China acquiesced in the "amicable concurrence toward a rational and practical end," which Mr. Wharton, *supra*, advocated, instead of "obstruction to the working of measures the adoption

of which has been in a large degree forced upon the legislative power of the United States by the conduct of the Chinese people in this country and by the attitude of the Imperial Government in their regard."

IV.

PRINCIPLES AFFECTING REPEALS BY IMPLICATION.

It will suffice to state in brief form the established doctrines upon repeals. Of course there is no express repeal here. In order that a later law shall work a repeal of an earlier one, there must be some manifest repugnancy, the effort of the law being always to reconcile the two acts and give effect to both, if possible. Even a recital in a statute that a former statute was or was not repealed is not conclusive as to such repeal. Whether a statute was so repealed is a judicial, not a legislative question. In affirmative statutes, such parts of the prior as may be incorporated in the subsequent statute, as consistent with it, must be considered in force. Repeals of statutes by implication are not favored and are never admitted where the former can stand with the new act, but only where there is positive repugnancy between the statutes, or the latter is plainly intended as a substitute for the former. Where two acts are not in express terms repugnant, the latter act must cover the whole subject of the former to operate as a repeal; and to have this effect, a later statute, not being repugnant in all of its provisions to a prior one, must clearly intend to prescribe the only rule which shall govern. An implied repeal only goes so far as the repugnancy extends.

A treaty dealing with a subject covered by particular laws may be regarded as analogous to a general act in its effect on such previous laws, and there the rule is that a general act is not to be construed to repeal a particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. Here the express reference to the previous legislation recognizes and incorporates it. It may be said that an implied repeal of a law by a treaty is less likely, and should appear more clearly, than the repeal of one act by another. As a rule treaties are not meant to operate upon our municipal laws, and the effect of a treaty as carrying a repeal is for that reason to be scrutinized with particular care. The intention of a treaty, in the vast majority of cases, is to deal only with our foreign relations, and to affect our internal situation in a limited way, as matter of comity and reciprocation on behalf of the subjects or citizens of a foreign power. In the particular case of China, there can be no doubt that the later treaties sought restriction, and the other laws carried that policy further, and this gives rise to a strong presumption against any such repeal.

And it seems apparent from the decisions of the court that there is a certain hesitation about giving to a treaty the effect of a repeal, even where the language is explicit to that effect. This was the case as to the decision of the court on the Jay treaty with England, by which it was determined, only after most careful

deliberation, that the clear language of the treaty had the effect of displacing or abrogating certain State laws confiscating debts due to aliens. (*Ware* v. *Hylton*, 3 Dall., 199.)

The gist of that case is that a "treaty can totally annihilate any part of the constitution of any of the individual States as contrary to the treaty," and can repeal or nullify any State law. (See also *Hauenstein* v. *Lynham*, 100 U. S., 483, 489.) Now, the treaty was clear, the result under its language irresistible, and the laws affected were the laws of a State and not of the United States. The solemnity with which the question, presenting in certain aspects no more startling conceptions than the claim of implied repeal of Federal laws by a later treaty, was regarded by the court, is shown all through the opinions. For instance, Mr. Justice Iredell says, "In delivering my opinion on this important case, I feel myself deeply affected by the awful situation in which I stand." The court, thus, while reaching a substantially unanimous judgment, plainly hesitates before a question, not only novel, but grave from all points of view. And yet there the repeal was express and the laws affected were State laws, which are subordinate, of course, where they conflict with the national authority in the international field.

While a treaty is part of the supreme law of the land, it is a convention, a contract in a special field of sovereign activities, rather than legislation. This dis-

tinction seems to lie at the bottom of the doubt expressed throughout our judicial and legislative history, whether enabling legislation is not always necessary to effectuate a treaty. To a limited extent that doubt has been set at rest where the stipulations are clear and do not require, for instance, appropriation by Congress. *A fortiori*, it seems to me, the special, technical effect, by way of implied repeal, of one statute—that is, one act of legislation upon another—ought not to be carried over to the domain of treaties, unless the purpose is beyond question. A later treaty may doubtless abrogate a treaty, as a later statute may repeal a statute, but the result in the case of successive treaties is rather because the contracting parties have changed their agreement than because the lawgiver has issued a fiat.

It is true that the power to repeal a treaty by a later statute has been sustained as a sovereign right, subject to international reclamation, just as the sovereign may declare a treaty abrogated by reason of the derelictions of the other power. But as to the reverse case—the repeal of a statute by a later treaty—it seems to me the mind instinctively approaches such a claim with grave doubt and caution. That result could not be sustained, at least, where there was serious question; that effect should require, if possible, stronger reasons and clearer certainty than repeal of statute by statute or treaty by statute. It is well recognized, of course, that this is delicate and doubtful ground, involving the power of Congress as

contrasted with the power of the Executive upon the Senate's ratification, and the judicial function of construction of both powers.

In short, if there is doubt whether various clear undertakings of treaties (not only for payment of money) may not be ineffective without affirmative and enabling legislation, much more appropriate is it to doubt whether a mere negative effect of a treaty—a repeal, by implication, of an entire series of laws—is possible without confirmation and recognition by a statute. This idea, I submit, would be persuasive where a treaty's implication of repeal might be clear and strong; it is irresistible where such implication is doubtful, and in this case so doubtful that on any test the repeal is a figment of the imagination.

Mr. Justice Story has said that—

> Though the power to make treaties is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution can not be construed to authorize the destruction of other powers given in the same instrument. (2 Story Const., 4th ed., sec. 1508.)

It is no unwarranted inference from that statement to say that for a treaty to overthrow laws upon a bare implication would be to destroy the fundamental law ascribing to the deliberate and reiterated intention of Congress to exclude and expel aliens the effect of a final mandate of sovereignty. But the utmost contention of the distinguished men who argued that acts of

Congress are not necessary to the validity of a treaty relied upon the express terms of the treaty and contemplated no vague and shadowy implications. (Mr. Calhoun and Mr. Pinkney in the House, as quoted by Senator Cullom, of Illinois, January 29, 1902; Congressional Record, Fifty-seventh Congress, first session, p. 1108.) Mr. Calhoun says, referring to the treaty of 1816 with Great Britain:

> It does not itself stipulate that a law should be passed to repeal the duties proposed to be repealed by this bill, which would be its proper form if in the opinion of the negotiators a law was necessary, but *it stipulates in positive terms for their repeal without consulting or regarding us.* (See also Annals of Congress, 14th Cong., 1st sess., p. 563.)

In *Foster* v. *Neilson* (2 Pet., 314, 315), Chief Justice Marshall, construing an article of the treaty of 1818 with Spain, ceding Florida, which read that "all grants of land * * * shall be ratified and confirmed by the persons in possession," etc., said that—

> The treaty is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.

On the translation of the treaty then before the court the chief justice evidently thought that the words "shall be ratified and confirmed" did import a contract and require an act of Congress; but when the same treaty was considered again in 7 Pet., 53, and the proper translation appeared to be "all grants of land shall *remain* ratified and confirmed," it was held that these words acted directly on the subject and needed no legislative sanction. All these doctrines respecting the affirmative or negative effect of a treaty are based upon clear and express stipulations. Certainly an implied repeal by a treaty must be evident and necessary.

The principles stated or suggested as to implied repeals are in the main not to be doubted, and do not require citation of authorities. This court has again and again announced the rules in language which I have substantially quoted. In this case the historic doubts as to repeal shown to have attached to treaties clearly intending that effect would be misplaced, for it seems to me a manifest perversion of legal argument to contend that the treaty of 1894 in any manner suggests a repeal. There is not only no express repeal, but no implied repeal—no apparent intention of repeal. On the contrary, the language of the treaty itself shows a recognition and acceptance by both contracting powers of the existing laws. The treaty is a contract, and it must be construed in that light and in the light of the negotiations and all the surrounding circumstances. After all the changes of ingenuity have been

rung upon the matter it is clearly impossible for counsel to wrest the language of the treaty into a repeal. The case is very clear when tested by the history of Chinese exclusion, the course of diplomacy, and the particular negotiations preceding this treaty—by the terms used and the intention of this Government at all times in pursuance of the well-known policy of Congress. There can not be any valid doubt that the treaty means legally what it says and what the Government contends it means, and that it has no effect as it has no purpose of repeal.

V.

THE BRIEFS IN OPPOSITION.

I submit some comments on the learned counsel's briefs. I risk the assertion that he has found it difficult to convince himself. I do not doubt that ultimately he has done so; at least he thinks the venture hopeful. But in reality he has set himself a hopeless task. Let one or two examples suffice as an illustration of his fallacies. On the second page of his Lee Yen Tai brief he cites the case of Mrs. Gue Lim in support of an intimation that Lee Yen Tai, being a member of the privileged classes, was not required to produce the usual certificate to establish his mercantile status. Now we know from Lau Ow Bew's case that a merchant returning to his domicile here does not need to produce that certificate, but it seems that now (since August 28, 1894), if he is excluded at the port or frontier this court will not interfere even if he claims the

right to return under some act or treaty, that is, whatever the ground of the executive refusal. (Lem Moon Sing's case.)

Mrs. Gue Lim's case merely decided that the valid wife of a duly domiciled merchant, who enters the country with or after her husband, does not require a certificate. None of the cases intimates that a Chinaman, claiming to be a merchant, who has passed the frontier clandestinely, without producing a certificate and without conforming to the act of 1893 as to the proof of merchant character, who offers no evidence at all that he is a domiciled merchant returning, or even a merchant (by reason of his status in China) entering for the first time—I say, none of the cases intimates that such a Chinese person is entitled to come in without the certificate of the act of 1884, and then to remain. This is the necessary though unconscious effect of counsel's argument and it reveals two mistaken notions at least.

The first is a return to the idea that if the Chinaman is "entitled of right under some law or treaty," then he ought to be allowed to enter and remain, notwithstanding defects in his own methods or formal papers and exclusion or expulsion by the respective officers of the law. This idea, so far as regards resistance to the executive jurisdiction at the frontier, was demolished by the Lem Moon Sing decision, and counsel makes some *pro forma* concession to that effect; but now, the Chinaman having evaded and defied this jurisdiction and gotten into the country, since he can

not be sent back to the finality of the administrative decision at the port of entry which he has ignored, he immediately sets up the same plea in the new judicial jurisdiction: "I am entitled of right to enter and remain: this jurisdiction, at least, is not expressly final. I want to go into the courts and all the way through the courts." This idea, if sustained, will certainly bring into the courts—not only the district court, but the circuit court of appeals, and ultimately this court—pretty much all Chinese cases which arise, as surely as the court foresaw would be the case in the situation of Lem Moon Sing.

Again, the authority to expel subject to only one appeal is quite as necessary, and while not as explicit is about as clearly intended as the final executive authority to exclude. To hold otherwise and sustain these numerous and increasing appeals would simply put a premium on the deliberate smuggling across the frontier in order to get away from the immigration authorities. The rules of the frontier decision (based upon the law; e. g., section 2 act of 1893) are strict; there are more chances that the claims of fraud and effrontery will get through the commissioners' court if the law is violated and the boundary passed by night at some lonely point. For there can be no doubt that the law intends and requires that *all* Chinese persons seeking to enter the country shall present themselves to the officers at the ports of entry. This notion, then, is the second mistaken notion to which I referred above, viz, that although such

Chinamen break the law when they enter the country, once in they may snap their fingers with impunity at all the laws. Certainly the policy of the law (in the judicial sense) on high and righteous grounds would frown at this.

The opposing briefs seek to avoid the effects of later statutes, annual appropriation acts for the enforcement of Chinese exclusions laws since 1894 (e. g., act of June 11, 1896; 29 Stat., 413, 431), etc. (the act of March 31, 1901; 31 Stat., 1093), on the ground that "the subsequent legislation of Congress does not evince any intent to continue judicial proceedings for unlawful entry."

It seems to me that one question overthrows this entire contention, viz, can it be maintained for a moment that Congress supposed that by these acts it was enforcing and effectuating not the Chinese exclusion laws but the treaty of 1894—enforcing exclusion but not expulsion?

The cases of *Todd* v. *United States* (158 U. S., 278) and *Rice* v. *Ames* (180 U. S., 371) merely hold that a United States commissioner is not a judge in the constitutional sense. The Government does not contend that commissioners are judges in the constitutional sense, but that in the meaning and intention of these laws "United States judge" covers such judicial officers. Counsel cites Treasury Decisions of February 7, 1899, and April 14, 1899, as holding that commissioners have no jurisdiction in non-registration cases. I

am unable to find these decisions, or any other rulings of the Treasury Department holding to that effect. Such statements are doubtless unintentional errors.

Counsel thinks that the burden of proof provision is abrogated by Article IV of the treaty extending to Chinese persons all of the most favored nation's rights except the right to become naturalized citizens. The authorities do not permit such treaty stipulations to overthrow positive law or to carry more than a general assurance of fair dealing and security from violence under the law. (*In re Parrott*, 1 Fed. Rep., 481; *In re Quong Woo*, 13 Fed. Rep., 229.) The favored nation privileges are only such as are gratuitous. Little is to be inferred from them. Special engagements, as, for instance, of extradition, stand in each case on particular stipulations of the treaty. (Whart. Int. Law Dig., Vol. II, sec. 134; Lawrence's Wheat., 493; Opinion of Mr. Cushing, 6 Op. A. G., 148.) Such clauses most frequently refer to commercial reciprocity, and even in that particular complete equality is difficult to obtain under such clauses. (Calvo, Le Droit International, Paris, 1896, Tome III, sec. 1597, pp. 365–366.)

There is nothing in the case of *Yick Wo* v. *Hopkins* (118 U. S., 356) militating against these contentions, because there, though the law itself was "fair on its face and impartial in appearance," yet it was "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."

The recent decision in *Tucker* v. *Alexandroff* (Jan. 6, 1902) contains nothing in support of counsel's argument. The decision of the court there in reference to an ordinary stipulation of treaties, which is peculiarly mutual, held that the particular convention with Russia, being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides* so as to carry out its manifest purpose. The court quoted Chancellor Kent's remark to the effect that treaties ought to receive a fair interpretation according to the intention of the parties and are to be kept with scrupulous good faith; that they are to be interpreted by the same rules of construction and course of reasoning applied to private contracts. No one doubts these principles, and they do not affect or interfere with the Government's position in these cases.

Recurring again to the argument, which I find it difficult to apprehend fully, that jurisdiction over non-registration cases is limited to United States judges by the terms of section 6 of the act of 1892, I have endeavored to show above that even if these cases should be considered non-registration cases (because the Government, it is true, might undertake to deport any Chinese laborer as non-registered, even if he did not enter until after the time for registration had expired) the jurisdiction of the commissioner is not to be doubted, and has constantly been exercised. Counsel, conceding that Lee Yen Tai's case was not founded on non-registration, because he entered for the first time in

1900, evidently considers, having to his own satisfaction gotten rid of the other grounds of the commissioner's jurisdiction, that he has driven the Government to its last defenses since the court in Fong Yue Ting's case, held that the registration law was a distinct, severable element of Chinese exclusion. I confess I can not perceive the precise bearing and issue of this argument; but at all events it is quite clear that it rests upon erroneous premises. These men are laborers, forbidden to come here by the treaty and other laws, whether ever here before or not, and section 12 of the act of 1884 and section 3 of the act of 1892 provide for their deportation.

When the Government argued that it is difficult to detect conflict between the treaty and the laws, and that no positive repugnancy could be found, it never meant to say, and did not say, that in certain perfectly obvious details the treaty has not slightly modified the laws. The Government merely says that the treaty has not wiped out the laws, nor greatly modified any material portion of them. Nor has the treaty of 1894 been such a substitution for the treaty of 1880 that the earlier treaty is repealed. All the laws and treaties stand together, and each bears a part in the aggregate entity, acting and reacting on each other in various ways, qualifying and modifying but not destroying each other.

When the Attorney-General, in 21 Op., 347, construing the supposed permissive character of article 3

of the treaty and holding that the certificate of the act of 1884 *must* now come from the proper governmental source, said that the treaty "requires nothing more than that," he said as plainly as language could say that the law required nothing more than a certificate from the government of the country where the applicant last resided; that it did not also require a certificate from the Government of China, and its requirement would not be satisfied by the latter certificate unless the applicant came from China. However, counsel goes somewhat further, and after first claiming that the certificate provision is now optional or permissive, but not mandatory, proceeds to concede that the provision is directory, but does not provide any penalty or any procedure for deportation, granting that the direction applies to the administrative officers and procedure. When this leads him to present to the court the statement that consequently it is plain that the two Governments were willing to rely upon this administrative system for enforcing the laws, and deliberately provided no procedure for deportation, it is labor lost to follow him. I do not think it is necessary to do more than place these sophistries before the court.

In the passage quoted from the opinion of Justice Story, speaking for the court in the *Amiable Isabella* (6 Wheat., 1), the learned justice declines, for the court, to annex a form to the treaty which had been omitted from that instrument. There was no statute involved; the proposition was that the court would

not supply such a deficiency and give effect to it, just because the treaty undertook to prescribe the form and failed to do so. That case has no bearing whatever on the present situation, nor has the case of *Geofroy* v. *Riggs* (133 U. S., 258, 271), holding that where a treaty *admits* of two constructions, one restrictive of rights and the other favorable to them, the latter is to be preferred. There is one possible construction of which this treaty admits, and that is the continued restriction manifest on its face. The reference to the *Amiable Isabella* case shows that counsel, starting with a claim that the treaty of 1894 repeals the legislation, is disposed to go to extreme lengths and assert that the legislation, to have any validity at all, must be expressly recognized by and incorporated in the treaty. That is to say, he passes on from the contention that an implied and doubtful negative effect of a treaty is to be recognized, to the contention that unless it positively and affirmatively recognizes previous laws they are nonexistent. It is difficult to deduce any other idea from his citation of the case of the *Amiable Isabella.*

Article III of the treaty of 1894 declares that the provisions of the convention "shall not affect *the right at present enjoyed* of Chinese subjects being officials," etc. The right was enjoyed under the treaty of 1880, under the act of 1882, which was passed to execute the stipulations of that treaty, and under the other intervening acts, which not only imposed but also regulated restriction, which not only prohibited entry

in certain cases, but guarded the right of entry in others. Article III recognizes all the legislation, unless we are prepared to say that by recognizing the allowances it intends to repudiate the prohibitions.

Article VI of the first draft proposed by China for the treaty of 1894 recites that China "has given her acquiescence to the recent legislation of the United States aforesaid." This not only means that she assented to the registration features of the acts of 1892 and 1893, but also means that she assented to the entire provisions of those acts. There is no demur based upon a distinction between different portions as separable. And the act of 1892 on its face continued in force all existing laws. Not only so, but, apart from this latter feature, the acquiescence and assent of China thus shown irresistibly infer an acceptance of legislation prior to 1892, saving only the act of October 1, 1888, which in the negotiations initiated by the treaty draft of 1894 she was seeking to abrogate in part, but, as it turned out, unsuccessfully.

What shall be said of the last clause of article III of the treaty, agreeing that Chinese laborers shall *continue* to enjoy the privilege of transit subject to regulations necessary to prevent abuse thereof? There was no allowance of transit in the treaty of 1880 nor in the intervening laws. The question of the transit privilege is now before the court, and the argument showed conclusively, I think, that there was grave doubt whether any such privilege existed under the

law; that this doubt was the subject of earnest complaint by China from 1880 on; that under the authority to prescribe regulations exercised by the Executive and recognized by the treaty as continuing, the allowance had been made in favor of Chinamen and obvious abuses had been defeated. This clause of article III is therefore strong evidence that the treaty recognized and assented to the entire scheme of laws existing in 1894.

VI.

CONCLUSION.

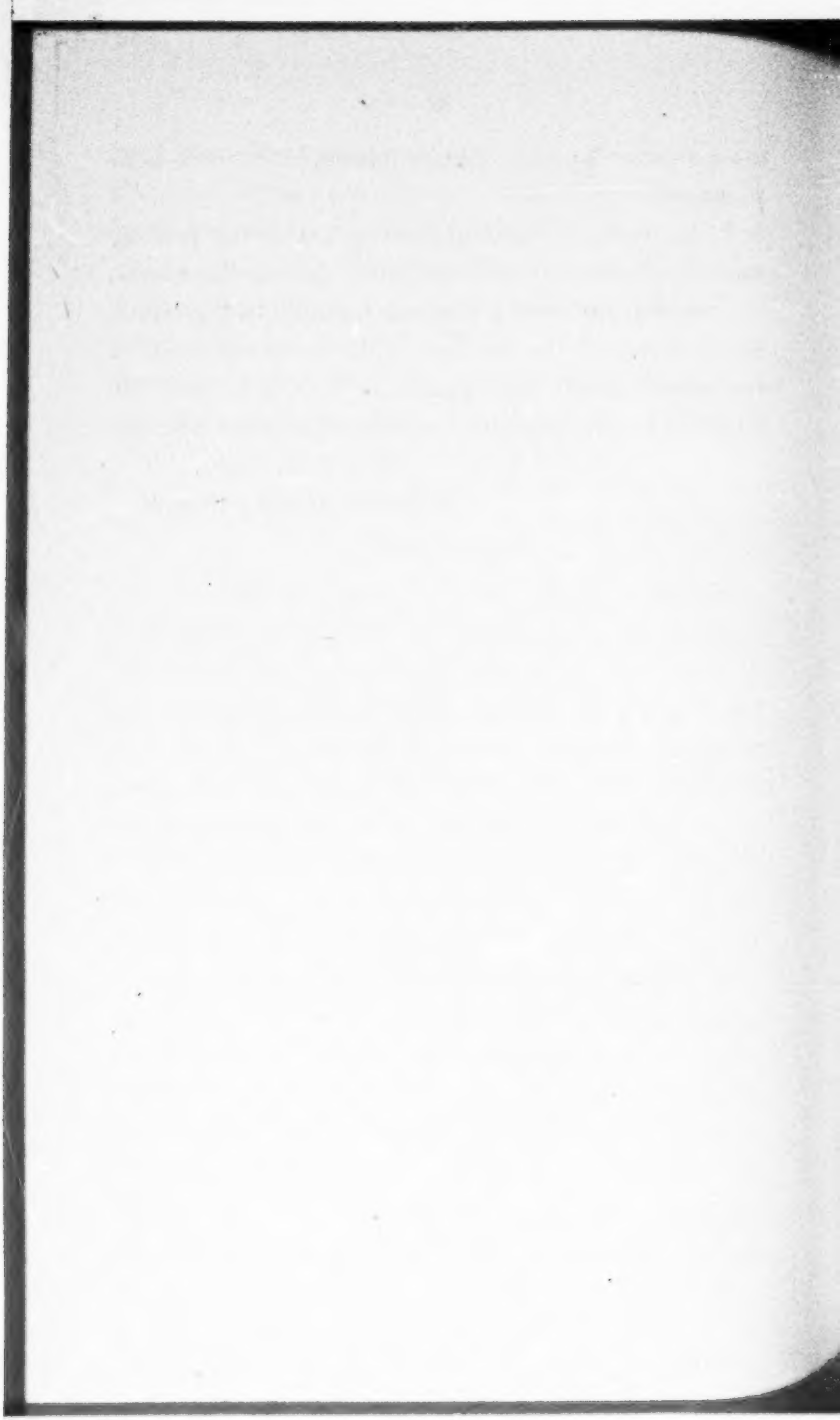
If the Government is correct in its contentions, it is important that the court shall make an unqualified announcement of the law on the subject in order that this controversy, embracing many cases, may be finally settled. For this seems to be, so to speak, the last ditch in the contest on these laws—the last important gap yet to be filled. The Chinese, no doubt, will continue their attempts to enter the country clandestinely, however the law may be determined, and however firmly it may seek to hold them to their just rights under the treaty and statutes. But this, so far as can be perceived, is the only unsettled controversy of any magnitude which remains to give aid and comfort to fraudulent claimants, seeking by appeals, *habeas corpus*, and various other devices, for delay—for some hopeful method of evading the law. In very many of the cases all that is really desired is time and an opportunity offered by discharge on bail to

escape from detection and expulsion, with much hope of success.

I beg to recall the court's attention to my preliminary briefs filed, which somewhat discuss the merits.

I respectfully submit that the question of the circuit court of appeals in No. 503 ought to be answered in the negative, and the appeals in Nos. 525 and 526 ought to be dismissed or the judgments below affirmed.

HENRY M. HOYT,
Assistant Attorney-General.



APPENDIX.

TREATY OF 1894 BETWEEN THE UNITED STATES AND CHINA (28 STAT., 1210).

Whereas on the 17th day of November, A. D. 1880, and of Kwanghsü, the sixth year, tenth moon, fifteenth day, a treaty was concluded between the United States and China, for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

And whereas the two Governments desire to cooperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

And whereas the two Governments are desirous of adopting reciprocal measures for the better protection of the citizens or subjects of each within the jurisdiction of the other;

Now, therefore, the President of the United States has appointed Walter Q. Gresham, Secretary of State of the United States, as his Plenipotentiary, and His Imperial Majesty, the Emperor of China has appointed Yang Yü, Officer of the second rank, Sub-Director of the Court of Sacrificial Worship, and Envoy Extraordinary and Minister Plenipotentiary to the United

States of America, as his Plenipotentiary; and the said Plenipotentiaries having exhibited their respective Full Powers found to be in due and good form, have agreed upon the following articles:

ARTICLE I.

The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ARTICLE II.

The preceding Article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited.

And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the

United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

ARTICLE III.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

ARTICLE IV.

In pursuance of Article III of the Immigration Treaty between the United States and China, signed

at Peking on the 17th day of November, 1880, (the 15th day of the tenth month of Kwanghsü, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V.

The Government of the United States, having by an Act of the Congress, approved May 5, 1892, as amended by an Act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided, with a view of affording them better protection, the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said Acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

And the Government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this Convention, and annually, thereafter, it will furnish to the Government

of China registers or reports showing the full name, age, occupation and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or travelling in China upon official business, together with their body and household servants.

ARTICLE VI.

This Convention shall remain in force, for a period of ten years beginning with the date of the exchange of ratifications, and, if six months before the expiration of the said period of ten years, neither Government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years.

In faith whereof, we, the respective plenipotentiaries, have signed this Convention and have hereunto affixed our seals.

Done, in duplicate, at Washington, the 17th day of March, A. D. 1894.

WALTER Q. GRESHAM [SEAL.]
YANG YU [SEAL.]

SECTIONS 4, 6, 12, ACT OF JULY 5, 1884 (23 STAT., 115).

* * * * * * *

SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, and in order

to furnish them with the proper evidence of their right to go from and come to the United States as provided by the said act and treaty between the United States and China dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books, to be kept for that purpose in which shall be stated the individual, family, and tribal name in full, the age, occupation, when and where followed, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost upon application therefor, from the collector or his deputy, in the name of said collector and attested by said collector's seal of office, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the individual, family, and tribal name in full, age, occupation, when and where followed, of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars.

In case any Chinese laborer, after having received such certificate, shall leave such vessel before her de-

parture, he shall deliver his certificate to the master of the vessel; and if such Chinese laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation.

The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and reenter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to reenter, and said certificate shall be the only evidence permissible to establish his right of reentry; and upon delivering of such certificate by such Chinese laborer to the collector of customs at the time of reentry in the United States, said collector shall cause the same to be filed in the custom-house and duly cancelled.

* * * * *

SEC. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full; title or official rank, if any; the age, height, and all physical peculiarities; former and present occupation or profession, when and where and how long pursued;

and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.

If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor said treaty shall be construed as embracing within the meaning of the word 'merchants' hucksters, peddlers, or those engaged in taking, drying or otherwise preserving shell, or other fish, for home consumption or exportation.

If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired.

The certificate provided for in this act, and the identity of the person named therein, shall, before such person goes on board any vessel to proceed to the United States, be vised by the endorsement of the diplomatic representatives of the United States in the foreign country from which such certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose endorsement is so required is hereby empowered, and it shall be his duty, before endorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to endorse the same.

Such certificate viséd as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

* * * * * *

SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel.

And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully to be or to remain in the United States, and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of

the United States, and shall be entitled to like compensation to be audited and paid by the same officers.

And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act.

SECTIONS 1, 3, 6, ACT OF MAY 5, 1892; 27 STAT., 25.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

* * * * *

SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States,

* * * * *

SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer within

the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost.

Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court.

And any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.

UNRATIFIED TREATY OF 1888. (EX. DOC. 272, FIFTIETH CONGRESS, FIRST SESSION, PP. 32–34.)

Whereas on the 17th day of November, A. D. 1880, a treaty was concluded between the United States and China for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

And whereas the Government of the United States and the Government of China desire to cooperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

Now, therefore, the President of the United States has appointed Thomas F. Bayard Secretary of State of the United States as his Plenipotentiary; and His Imperial Majesty the Emperor of China has appointed Chang Yen Hoon Minister of the Third Rank of the Imperial Court, Civil President of the Board of Imperial Cavalry and Envoy Extraordinary and Minister Plenipotentiary as his Plenipotentiary; and the said Plenipotentiaries, having exhibited their respective Full Powers found to be in due and good form, have agreed upon the following articles:

ARTICLE I.

The High Contracting parties agree that for a period of twenty years, beginning with the date of the exchange of the ratifications of this Convention, the

coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ARTICLE II.

The preceding article shall not apply to the return to the United States of any Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited.

And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return, which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States.

Article III.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described, to admission into the United States they may produce a certificate from their Government or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulation by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

Article IV.

In pursuance of Article III. of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880, it is hereby understood and agreed that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III., to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V.

Whereas, Chinese subjects, being in remote and unsettled regions of the United States, have been the victims of injuries in their persons and property at the hands of wicked and lawless men, which unexpected events the Chinese Government regrets, and for which it has claimed an indemnity the legal obligation of which the Government of the United States denies; and whereas the Government of the United States, humanely, considering these injuries and bearing in mind the firm and ancient friendship between the United States and China, which the High Contracting Parties wish to cement, is desirious of alleviating the exceptional and deplorable sufferings and losses to which the aforesaid Chinese have been subjected; therefore, the United States, without reference to the question of liability therefor (which as a legal obligation it denies), agrees to pay on or before the first day of March, 1889, the sum of Two hundred and seventy-six thousand six hundred and nineteen dollars and seventy-five cents ($276,619.75) to the Chinese Minister at this capital, who shall accept the same, on behalf of his Government, as full indemnity for all losses and injuries sustained by Chinese subjects as aforesaid, and shall distribute the said money among the said sufferers and their relatives.

ARTICLE VI.

This Convention shall remain in force for a period of twenty years, beginning with the date of the exchange of ratifications; and if, six months before the expiration of the said period of twenty years, neither Government shall formally have given notice of its termination to the other, it shall remain in full force for another like period of twenty years.

FIRST PROPOSED DRAFT OF CONVENTION OF 1894, SUBMITTED BY THE MINISTER OF CHINA.

Whereas, on the 15th day of the tenth month of Kwang Hsü sixth year, the 17th day of November, Anno Domini 1880 a treaty was concluded between the United States and China, for the purpose of regulating, limiting or suspending the coming of Chinese laborers to and their residence in the United States;

And whereas in the 14th year of Kwang Hsü, Anno Domini 1888, the Government of China and the Government of the United States, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers had given rise in certain parts of the United States, drafted a Convention for the purpose of prohibiting the emigration of such laborers from China to the United States;

And whereas the legislative measures adopted by the Government of the United States, in consequence of the non-ratification of the aforesaid Convention, have been found to be in conflict with the interests of China and not in pursuance of the Treaty of the sixth year of Kwang Hsü, Anno Domini 1880;

And whereas the Government of the United States and the Government of China, in consideration of the annulment by the Government of the former of all the legislative measures enacted in and since the year 1888 affecting the coming of Chinese subjects into the territory of the United States and their residence therein, desire to agree upon a new Convention for the prohibition of emigration of laborers from China to the United States and the protection of Chinese interests and of the Chinese people—residing in the United States, to the end that the two people may live together in harmony and peace and that the bonds of friendship between the two nations may be further strengthened;

Now, therefore, the President of the United States has appointed ——— ——— as his Plenipotentiary and his Imperial Majesty, the Emperor of China has appointed ——— ——— as his Plenipotentiary, and the said Plenipotentiaries having exhibited their respective full powers, found to be in due and good form, have agreed upon the following articles:—

ARTICLE I. The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ARTICLE II. The preceding Article shall not apply to the return to the United States of any Chinese laborer who has a lawful wife, child, or parents in the United States, or property therein of the value of One thousand dollars, or debts of like amount due him and pending settlement. Never-the-less, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the Collector of Customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said Collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe, and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited.

And such right of return to the United States shall be exercised within one year from the date of leaving the United States, but such right of return to the

United States may be extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese Consul at the port of departure, and by him certified to the satisfaction of the Collector of the port at which such Chinese subject shall land in the United States.

And the wives and minor children of Chinese persons, who are now in the United States, and who are entitled to be and remain therein, shall be entitled to enter the United States upon the production of a certificate issued by the American Minister or by any American Consul-General or Consul accredited to the Chinese Government.

ARTICLE III. The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects being officials, teachers, students, merchants, or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government, or the Government where they last resided viséed by the Diplomatic or Consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

ARTICLE IV. In pursuance of Article III of the Immigration Treaty between the United States and China signed at Peking, on the 17th day of November 1880, it is hereby understood and agreed that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens and the Government of the United States reaffirms its obligation, as stated in said Article III to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V. It being the object of the Government of the United States to avoid the ingress into her territory of elements which may endanger the good order of the country, the said Government hereby agrees that if Chinese subjects, having violated any law of the Chinese Empire, take refuge in the territory of the United States under the guise of merchants, students, travellers, religious emissaries or the like or laborers and the same is ascertained by the Chinese Government and by them brought to the notice of the Government of the United States, it shall be the duty of the local authorities to apprehend every such offender of the Chinese law and to deliver him over to the custody of the proper accredited representative of that Government for deportation back to China.

Reciprocally, if any citizens of the United States, having committed an offence against the laws of that country, take refuge in the territory of China, the Government of China agrees likewise to grant extradition of such citizens to the Government of the United States upon its application for same.

ARTICLE VI. Whereas the Government of the United States, in order to afford better protection to Chinese subjects residing in the United States, has recently enacted a law providing for the registration of such Chinese; whereas no legislation of this nature has been enacted by the Government of any other nation for the protection of aliens residing in its territory; whereas the Government of China, out of a sincere regard for friendly international relations has given her acquiescence to the recent legislation of the United States aforesaid; and whereas it behooves China, having equal responsibility in guaranteeing protection to citizens of the United States residing in her territory, to adopt a similar course; it is hereby agreed between the Government of the United States and the Government of China, that after the exchange of ratifications of this Convention the Government of the latter, may adopt measures similar to those now enforced by the Government of the former, providing for the registration of all citizens of the United States residing in China, whether as missionaries, students, merchants, travellers or otherwise, to the end that protection may be always guaranteed them, exception being made in the case of diplomatic and other officers of the United States Government residing or travelling in China upon the business of their own Government, together with their body and household servants, whose registration shall not be required.

This being a special article of reciprocity between the two nations, the 'most favored nation' clause shall not be quoted to apply thereto.

Article VII. This Convention shall remain in force for a period of ten years, beginning with the date of

the exchange of the ratifications; and if, six months before the expiration of the said period of ten years, neither Government shall formally have given notice of its termination to the other, it shall remain in full force for another like period of ten years.

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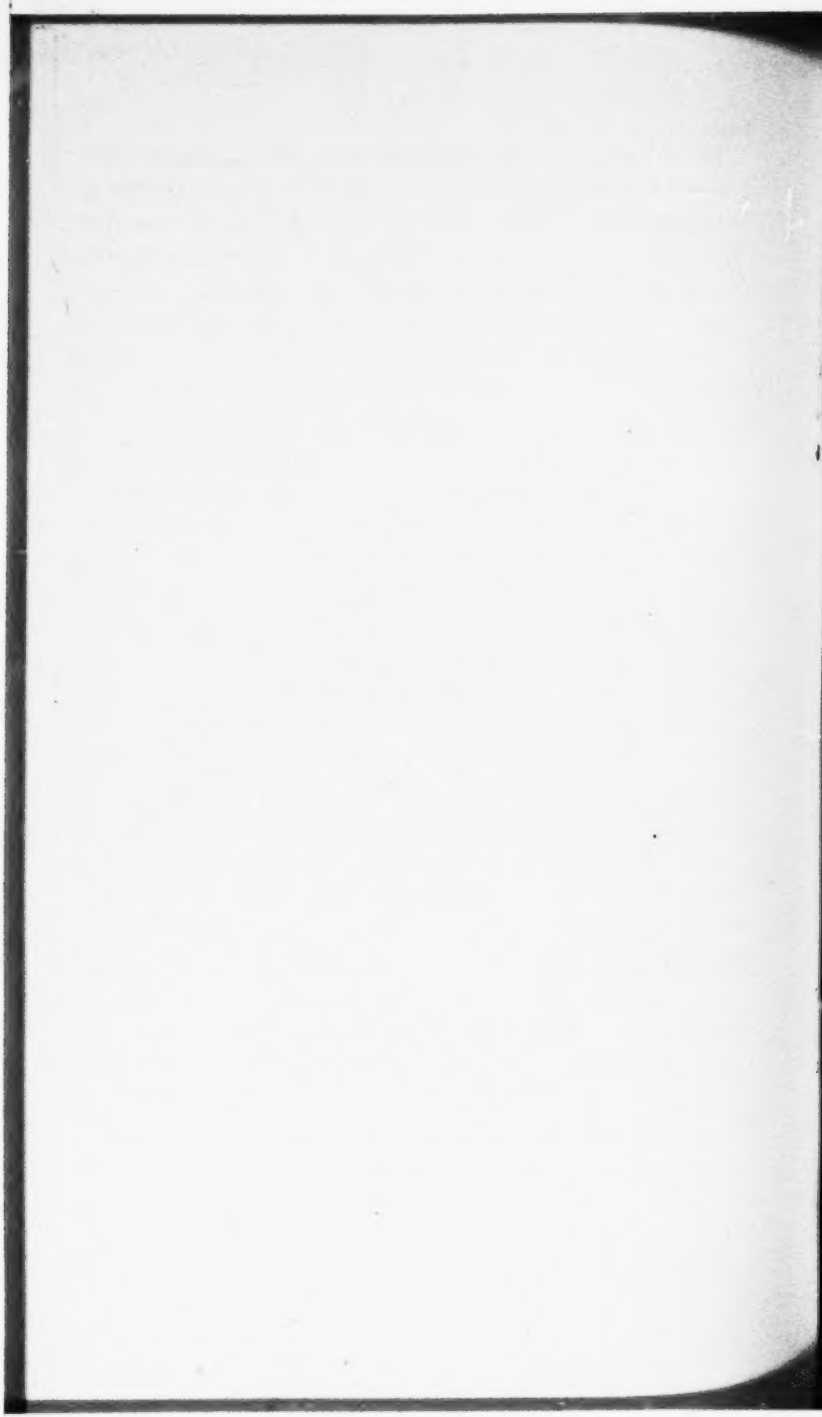

Office Supreme Court U.S.
FILED
MAR 29 1902
JAMES H. McKENNEY,
Clerk.

3919

Nos. 503, 525 & 526

Sug. Br. of Atty. Gen. (Hoyt)
for United States.

In the Supreme Court of the United States.

Filed Mar. 29, 1902.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

CHIN BAK KAN
v.
THE UNITED STATES. } No. 525.

CHIN YING
v.
THE UNITED STATES. } No. 526.

I beg to submit to the court, with the consent of opposing counsel, an opinion recently delivered by the circuit court of appeals for the ninth circuit in the case of *Fong Mey Yuk*. This was one of the so-called "slave girl" cases, the Chinese woman alleging American citizenship. It is evident that the court was not satisfied as to the fact of birth in the United States, or as to the permanent domicile and residence here of the parents, required by the *Wong Kim Ark* decision.

HENRY M. HOYT,
Assistant Attorney-General.

21284—02

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 716.

FONG MEY YUK, APPELLANT, v. THE UNITED STATES OF AMERICA, APPELLEE.

BEFORE GILBERT AND MORROW, CIRCUIT JUDGES, AND HAWLEY, DISTRICT JUDGE.

The appeal in this case is taken from the judgment of the district court affirming an order of deportation of the appellant, Fong Mey Yuk, who was arrested at San Francisco on April 20, 1901, upon a warrant issued by the United States commissioner, upon a complaint sworn to and lodged with said commissioner charging the appellant with being a Chinese manual laborer without the certificate of residence required by the act of Congress, entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, and the act amendatory, approved November 3, 1893. On May 2, 1901, the appellant was brought to trial before said commissioner. Upon the evidence adduced, the commissioner made his findings and judgment of deportation, holding that the appellant is a Chinese manual laborer and a subject of the Empire of China, and that she was found within the limits of the United States without the certificate of residence required by said acts, and that she had not shown that she had been unable to obtain such certificate for any of the reasons which the act specifies as excuses therefor.

Gilbert, circuit judge, after stating the case as above, delivered the opinion of the court:

The appeal presents two questions: First, had the United States commissioner jurisdiction to hear and determine the charge set forth in the complaint? and, second, was the evidence sufficient to justify his judgment? Section 12 of the act of May 6, 1882, provides that any Chinese person found unlawfully within the United States shall be deported to the country whence he came, after being brought before some "justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." Section 12 of the act of July 5, 1884, provides substantially the same remedy as that of the act of May 6, 1882. Section 13 of the act of September 13, 1888, provides that any Chinese person found unlawfully in the United States may be arrested upon a warrant issued upon a complaint under oath "by any justice, judge, or commissioner

of any United States court," and that when convicted upon a hearing and found and adjudged to be one not lawfully entitled to be or remain in the United States to be removed to the country whence he came. Section 2 of the act of May 5, 1892, provides "that any Chinese person or person of Chinese descent when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States shall be removed from the United States to China." The previous acts had required that such person be removed to the country whence he came. Section 6 makes provision for the issuance of certificates of residence to Chinese persons lawfully in the United States, and enacts that "any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage thereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be decreed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge." It is contended that all the prior legislation referred to Chinese who unlawfully entered the United States, and that by the act of 1892 provision was made for the deportation of a different class—those who, although they had entered lawfully, had failed to acquire the right to remain, and were therefore unlawfully within the United States—and it is contended that as to this second class the jurisdiction to order deportation is conferred only upon "a United States judge." Section 1 of the act of May 5, 1892, provides: "All laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act." Those laws, so continued in force, it may be conceded have reference to prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, and not the deportation of Chinese persons found to be unlawfully within the country. There would be no authority in the act of May 5, 1892, for the present proceeding were it not for section 3, which provides as follows: "That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." That section declares in plain terms that a proceeding may be instituted before a commissioner against any Chinese arrested under the provisions of the act of May 5, 1892. It has the effect to enlarge the provision of section 6 and to enact that the proceeding may not only be before a United States judge, but that it may be before a justice, judge, or commissioner. If there be any doubt that this is the true construction of the act, it is dispelled by the act of March 3, 1901 (31 Stats., 1093), which provides as follows: "That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States or having unlawfully entered the United States to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing."

We find no ground for holding that the evidence is insufficient to justify the findings, judgment, and order of deportation. The commissioner saw the witnesses, heard their testimony, and reached the conclusion that the appellant was born in China and that she was a laborer and that she had not procured the certificate entitling her to remain in this country as provided by law. There is no contention that in so holding he was guided by any erroneous view of the law or the evidence. Such being the case, we would not be justified in disturbing his conclusion, even if we deemed it contrary to the weight of the evidence, which we do not. The burden of proof rested upon the appellant to prove to the "satisfaction of the court" the facts upon which depended her right to remain in the United States. This she failed to do. The judgment of the district court is affirmed.

(Indorsed:) Opinion. Filed February 24, 1902. F. D. Monckton, clerk.

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